

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i> ,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OBJECTION TO CERTAIN REFERENCES
MADE IN THE TYSON DEFENDANTS' OPENING STATEMENT**

The State of Oklahoma ("the State") objects to the Tyson Defendants' opening statement on the ground that certain statements in the Tyson Defendants' opening statement (1) violated this Court's motion in limine rulings, (2) misstated a Court ruling, and (3) suggested that the State made a representation in its opening statement that it did not.

The State is cognizant that parties are traditionally granted wide latitude in what may be said in opening statement. That latitude does not extend, however, to violating Court rulings, misstating a Court ruling, and misrepresenting what the State has said in its opening statement. Because this is a bench rather than jury trial, and out of courtesy to the Tyson Defendants, the State did not interrupt the Tyson Defendants' opening statement with its objections. However, the State does wish to bring these improprieties to the Court's attention, and requests that the Court admonish the Tyson Defendants to honor this Court's motion in limine rulings, not misstate this Court's prior rulings, and accurately portray the State's representations. The following are some examples of the objectionable statements made by the Tyson Defendants in their opening statement.

For instance, the Tyson Defendants made a number of references in their opening statement that characterized this action as the Attorney General's lawsuit rather than the State's lawsuit in violation of one of the Court's in limine orders. Specifically, the Tyson Defendants stated the following:

Your Honor, this is not a referendum on modern-day poultry-farming. The Attorney General clearly does not like poultry-farming; that's regrettable. But that fact -- but the fact remains that poultry-farming is both a legal, I believe, an honorable profession, and none of the elements of the claims that this court has to decide will turn on whether or not the court or anyone else likes or dislikes poultry farming.

Sept. 24, 2009 Daily Trans., 80:13-21. The Tyson Defendants followed this statement with the following:

It's clear the Attorney General of the State of Oklahoma disagrees with some of the policy choices that have been made by the Oklahoma Department of Ag and legislators and regulators in Oklahoma and Arkansas on how poultry litter should be regulated. Now, policy debates and disagreements are a healthy part of our democracy, but a lawsuit before this court is not the place to arbitrate or resolve those policy differences.

Sept. 24, 2009 Daily Trans., 81:2-7. And a short while later, the Tyson Defendants stated the following:

[I]t will be clear to the court that Oklahoma farmers, and the defendants in this case as well, are caught in a political tug of war between the Attorney General, the legislature, and the officials at the agencies that actually regulate poultry farms.

Sept. 24, 2009 Daily Trans., 108:16-20. Putting aside the substantive issue of whether these statements are even accurate, the plain intent of such statements was to suggest that this action is being prosecuted to vindicate the Attorney General's interests rather than the State's interests. Such characterizations of this action were the subject of a motion in limine by the State. *See* DKT #2406 ("Motion in Limine to Preclude Defendants from Referring to this Action as Anything Other than 'the State's' Lawsuit"). That motion was granted by the Court. *See* Sept.

15, 2009 Trans., 185:1-4 ("To make short work of it here then, docket number 2406, State of Oklahoma's motion in limine to preclude defendants from referring to this case as anything other than the State's lawsuit is granted").

The Tyson Defendants also made reference to the denial of the State's motion for preliminary injunction and the Court's findings made therein in their opening statement. This was also in violation of one of the Court's in limine orders. Specifically, the Tyson Defendants stated:

But, Your Honor, I would submit to you that the evidence that was insufficient at the preliminary injunction hearing is the same evidence that's being brought into this court on bacteria today, and it's still insufficient to prove causation. Your Honor, I would also say that when you get to phosphorus, on this question of causation, the state's phosphorus case suffers from the same evidentiary gaps that were found in the state's bacteria case earlier in this proceeding.

Sept. 24, 2009 Daily Trans., 151:7-16. The State filed a motion in limine to preclude such statements. *See* DKT #2405 ("Motion in Limine to Preclude Defendants from Making Reference to the Denial of the State's Motion for Preliminary Injunction or to any Factual Findings Made Therein"). The Court granted this Motion. *See* Sept. 15, 2009 Trans., 92:11-14 ("Very well, document number 2405, the State's motion to preclude defendants from making reference to the denial of the State's motion for preliminary injunction or any factual findings made therein is granted").

In addition to these examples of violations of motion in limine orders, in their opening statement the Tyson Defendants also misstated this Court's prior ruling regarding Defendants' liability related to the land application of poultry waste by third persons (*i.e.*, by persons other than Defendants, persons applying poultry waste on Defendants' land, contract growers, and / or persons applying poultry waste on contract growers' land). As the issue presently stands, this Court has *not* precluded the imposition of liability on Defendants for such land application of

poultry waste by third persons under RCRA. *See* Sept. 4, 2009 Trans., 239:22-40:2 ("So I am going to decline to grant it in that regard"). Moreover, the Court has reserved ruling with respect to the existence of such liability under the State's claim under 27A Okla. Stat. § 2-6-105. *See* Sept. 4, 2009 Trans., 240:11-20 & 243:9. The Court has granted the motion only as to Restatement (Second) of Torts, § 427B liability for poultry waste transferred by poultry growers to third persons for land application on non-grower property under the State's common law nuisance and trespass claims. *See* Sept. 4, 2009 Trans., 240:3-10;¹ *see also* Sept. 4, 2009 Trans., 244:13 ("2407 is granted in part, denied in part"). Despite this series of rulings regarding this issue, in their opening statement the Tyson Defendants stated:

However, the court has already correctly determined that these defendants are not liable for the use of poultry litter by ranchers and cattlemen in the Illinois River Watershed with whom they have no contractual relationship.

Sept. 24, 2009 Daily Trans., 87:14-18. The Tyson Defendants further stated:

It's not a litter pile on some contract grower's farm. It's not a litter pile located on any person's property for which these defendants can be held legally responsible. I don't know if that sod farmer did anything wrong or not, but I know that that is not a basis for liability against these defendants. . . . Your Honor, this is the sod farm. Once again, this is someone whose acts are not really at issue in this case. It's not someone that these defendants contract with. It's not someone that these defendants can be held liable for.

Sept. 24, 2009 Daily Trans., 99:2-8 & 99:14-18. These statements plainly misstate this Court's prior ruling on this issue. Liability for such conduct has not been precluded.

In their opening statement the Tyson Defendants also asserted that the State made a representation in its opening statement that the State did not. Specifically, in their opening statement the Tyson Defendants made reference to slide 15 of the State's opening statement

¹ The State has moved for reconsideration of this ruling. *See* DKT #2623. While Defendants have been critical of the State for bringing motions for reconsideration in this action, such motions are the proper way to challenge rulings with which a party does not agree. The proper way to challenge such rulings is not to simply ignore them.

demonstratives. *See* Sept. 24, 2009 Daily Trans., 100:1-18. While the State did disclose this slide as one of the demonstratives it might use in its opening statement, the State did not in fact use this demonstrative in its opening statement because it, too, recognized in the course of its preparations for opening statements that the demonstrative did not depict a poultry waste pile. As such, the Tyson Defendants' assertions in their opening statement were inaccurate.

Conclusion

With this filing, the State has not undertaken to exhaustively catalog all of the objectionable statements made in the Tyson Defendants' opening statement. Rather, the State simply seeks to highlight the fact that the Tyson Defendants, in their opening statement, violated Court rulings, misstated a Court ruling, and misrepresented what the State said in its opening statement. The State requests that the Court admonish the Tyson Defendants to honor this Court's motion in limine rulings, not misstate this Court's prior rulings, and if it chooses to comment on the State's presentations to do so accurately.

Respectfully Submitted,

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I hereby certify that on this 28th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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